

AMERICAN ARBITRATION ASSOCIATION

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In the Matter of the Arbitration

between

CITY OF PHILADELPHIA,

“City”

- and -

F.O.P, LODGE NO. 5,

“Union”
-----X

AAA Case No.
01-16-0000-6569

Opinion & Award

Re: Suspension of
Dominick Whack

Hearing: March 30, 2017

APPEARANCES

For the City

CITY OF PHILADELPHIA LAW DEPARTMENT
Frank E. Wehr, Esq., Assistant City Solicitor

For the Union

JENNINGS SIGMOND, P.C.
Marc L. Gelman, Esq., Of Counsel

BEFORE: David J. Reilly, Esq., Arbitrator

BACKGROUND

The Department suspended Police Officer Dominick Whack based upon a finding that he had violated Disciplinary Code Section 1-§010-10 by knowingly and willfully making a false entry in a Department record or report. The Union contends the City lacked just cause to impose this discipline. It asks that the suspension be reversed and all reference to it be expunged from Whack's disciplinary record. In addition, it requests that Whack be made whole for all pay and benefits lost as a consequence of the suspension.

The relevant facts of this case, which are largely undisputed, may be set forth succinctly:

Whack has been a member of the Department for over twenty-six years. At the time of the incident that led to the suspension at issue, he had no active prior discipline.

By policy, the Department mandates certain grooming standards applicable to all police officers. These standards, which are set forth in Department Directive 78, include a proscription against beards and goatees, except when consistent with the officer's assignment. (City Exhibit 1.)

The Directive allows for both religious and medical exceptions to this prohibition. In order to receive a religious exception, an officer must submit a written request, identifying the name of his religion and the specific beard requirement. In addition, he must provide a statement from his religious leader, on the institution's letterhead, confirming that he practices a religion requiring him to maintain a beard.¹ Further, the Directive specifies that any religious exception granted will be valid for only twelve

¹ The Directive states that the documentation submitted in connection with such religious exception request must be notarized or subject to verification.

months. As such, an officer must reapply at the conclusion of each one-year period if he wishes to obtain a renewal of the exception. (City Exhibit 1.)

Whack testified to being a practicing Muslim for over thirty years. The tenets of Islam, he averred, mandate that he maintain a beard. For this reason, he stated, once the Department established a religious exception to Directive 78's prohibition against beards, he began applying for and receiving an annual waiver, continuing through the present year. (City Exhibits 2A-2J.) In doing so, he confirmed providing a letter each year from Imam Y █ J █ of the █, where he is a member, stating that as a practicing Muslim, he is required to grow a substantial beard. (City Exhibit 2A-2J.)

Lieutenant David Hunter, an investigator with Department's Internal Affairs Division ("IAD"), testified that on or about January 2, 2015, IAD received a complaint of police misconduct against Whack. According to Hunter, M █ M █, Whack's former girlfriend, reported that he had been submitting forged documentation to obtain a religious exception to Directive 78's beard prohibition.

In response to this complaint, Hunter reported interviewing M █, who confirmed her allegations. M █, he stated, advised that for several years, Whack had been falsifying the supporting documentation for his annual waiver request. She explained that rather than getting a new letter each year from J █ to support his application, he had had been submitting a prior year's letter, which he had altered to reflect a date contemporaneous with the submission.²

² M █ detailed that in or about 2007, Whack "whited out" the date on one of J █'s confirming letters and then made multiple copies. Each year thereafter, she recounted, Whack entered the current date on one of these copies, which he then attached to his religious exception application. M █ did not testify in this proceeding. The foregoing account was testified to by Hunter, and is also reflected in the report of his investigation. (City Exhibit 4.)

According to Hunter, he then obtained copies of all of Whack's religious exception applications then on file at the 17th District where he is assigned. (City Exhibit 2A-2J.) He reported showing these documents to J [REDACTED], who confirmed that he last signed a supporting letter on Whack's behalf in 2009. He related further that upon reviewing the documents, J [REDACTED] verified his signature on the supporting letters attached to Whack's religious exception applications for 2011 – 2014, but stated that the date alongside each signature was not his handwriting. (City Exhibits 2F-2J.)

Thereafter, Hunter recounted interviewing Whack, at which time he presented these same documents and advised him of the statements made by M [REDACTED] and J [REDACTED]. In response, he recalled that Whack acknowledged entering the date on the copy of J [REDACTED]'s letter attached to his 2011-2015 religious exception applications. Whack, he recalled, acknowledged following this practice out of convenience, explaining that it was difficult to obtain a new letter each year due to J [REDACTED]'s frequent absences from the mosque. (City Exhibit 3.)

In his testimony, Whack did not dispute Hunter's account of his statements. Nonetheless, he maintained that his actions did not violate Directive 78, and in turn, Disciplinary Code Section 1-§010-10.³ Explaining this belief, he noted that the information contained in the supporting letter attached to each exception application at issue was accurate. He stated further that at the time each exception application was submitted, he believed that J [REDACTED] would confirm that fact if questioned by the Department.

³ Department Disciplinary Code Section 1-§010-10, which falls under Article I – Conduct Unbecoming, proscribes “knowingly and willfully making a false entry in any Department record or report.” (City Exhibit 6.)

Hunter testified that upon conclusion, his investigation substantiated that Whack had falsified official documents by attaching a forged supporting letter from J [REDACTED] to his annual religious exception applications dated December 31, 2010, January 30, 2012, December 28, 2012, December 13, 2013 and December 9, 2014. (City Exhibit 4.) As a result, he explained, Whack was charged with violating Department Disciplinary Code Section 1-§010-10. (City Exhibit 6.)

At a subsequent Police Board of Inquiry (“PBI”) Hearing, which was held on October 21, 2015, Whack was found guilty of this charge. (City Exhibit 5.) On the basis of the PBI’s recommendation, the Department suspended Whack for five days, beginning January 11, 2016. (Joint Exhibit 3.)⁴

This action prompted the instant grievance. (Joint Exhibit 2.) When the parties were unable to resolve the matter at the lower stages of the grievance procedure, the Union demanded arbitration. Pursuant to their contractual procedures, the parties selected me to hear and decide the case. (Joint Exhibit 1.)

I held a hearing in this case on March 30, 2017, at the offices of American Arbitration Association in Philadelphia. At that time, the parties each had full opportunity to present evidence and argument in support of their respective positions. Upon the conclusion of the hearing, the hearing record was declared closed.

⁴ The Department’s Disciplinary Code prescribes a penalty range of a 5-day suspension to dismissal for a first offense violation of Code Section 1-§010-10. (City Exhibit 6.)

DISCUSSION AND FINDINGS

The Issue:

The parties have stipulated that the issues to be decided are as follows:

1. Did the City have just cause to suspend the grievant, Police Officer Dominick Whack for five days, effective January 11, 2016?
2. If not, what shall be the remedy?

Positions of the Parties

The City contends that its suspension of Whack was for just cause. It maintains that the evidence conclusively demonstrates that he was guilty of violating Disciplinary Code Section 1-§010-10 as charged.

The City stresses that there is no dispute concerning the relevant facts. In particular, it highlights that the evidence, which includes Whack's own admissions, shows that on five occasions from December 2010 through December 2014, he violated Department Directive 78. He did so on each occasion, it explains, by altering the date on the supporting letter included with his application for a religious exception to the Directive's beard prohibition. His actions in this regard, it concludes, constitute the knowing and willful filing of a false Department report, and thus, substantiate that he violated Department Disciplinary Code Section 1-§010-10.

It reasons further that having established Whack's guilt of the charged violation, there can be no contest as to whether a five-day suspension was an appropriate penalty. Indeed, it points out that under the Disciplinary Code, which has been negotiated between the City and the Union, a five-day suspension is the lowest level of discipline prescribed for this offense.

Accordingly, for all these reasons, the City asks that the suspension be sustained and the grievance be denied.

The Union, on the other hand, maintains that the City lacked just cause to suspend Whack based upon the religious exception applications at issue here. The Union submits that the City has failed to meet its burden of proof in this regard.

The Union does not dispute that Whack altered the date on the supporting letter from J [REDACTED] that accompanied each of his religious exception applications from December 2010 through December 2014. It argues, however, that those applications, including the supporting letter from J [REDACTED] attached to each, do not constitute a Department record or report. Further, it contends that nothing contained in any of those applications or the attached supporting letters was false. To the contrary, it stresses that each application truthfully states his request to maintain a beard for religious reasons in accordance with his Islamic faith and references an attached letter from J [REDACTED] to satisfy the requirements of Directive 78. In addition, it points out that in each case, the attached letter, albeit stale, was written by J [REDACTED].

In addition, it maintains that while it has been demonstrated that Whack knowingly changed the date on the supporting letter from J [REDACTED] that accompanied each religious exception application, the City has failed to show he knowingly filed a false report. It reasons in this regard that Directive 78 does not mandate that a police officer seeking to renew a religious exception to the beard prohibition must file a current letter from his religious leader. Absent such a requirement, it concludes, Whack cannot be found to have knowingly and willfully filed a false report on the dates at issue by attaching an earlier year's letter from J [REDACTED] to his religious exception application.

Accordingly, for these reasons, the Union asserts that its grievance should be granted and the requested relief awarded.

Opinion

There is no dispute as to the underlying facts here. Indeed, Whack and the Union concede the City's account of his relevant actions. Specifically, on five occasions from December 2010 through December 2014, he submitted a religious exception application to Directive 78's beard prohibition, which included a supporting letter from his Imam from an earlier year, but which he had altered to reflect a date contemporaneous with the submission.

The only matter in dispute then is whether his actions in this regard constitute a violation of Department Disciplinary Code Section 1-§010-10. Stated otherwise, the question before me is whether his submission of the religious exception applications at issue constituted a knowing and willful making of a false entry in a Department record or report. On review, I conclude that he is guilty of violating this section of the Disciplinary Code. My reasons follow.

I am not persuaded by the Union's assertion that the religious exception applications at issue here do not qualify as a Department "record or report" for purposes of Disciplinary Code Section 1-§010-10. I find no basis to give such a narrow construction to this section of the Disciplinary Code. Quite the opposite, the use of the term "record or report" in this section convinces me that its scope is not limited to reports filed by officers in the performance of their official police duties. Instead, it extends to entries made in records submitted or maintained relative to their employment as members of the Department. Under this construction, Disciplinary Code Section 1-§010-10 plainly

applies to an application for a religious exception to the beard prohibition of Directive 78. Indeed, there can be no doubt that an application to secure an exception to the Department's grooming standards, including the accompanying supporting letter, amounts to a Department record.

Likewise, I find unavailing the contention that Whack's actions did not constitute the knowing and willful making of such a false entry. The weight of the credible evidence is entirely to the contrary.

The record, which includes Whack's own testimony, confirms that each of the religious exception applications at issue included a supporting letter from his Imam, which he had intentionally altered to reflect a date contemporaneous with the application's submission. Such actions, by definition, constitute the knowing and willful making of a false entry in a Department record.

Contrary to the Union's argument, it matters not for purposes of this determination whether Directive 78 mandates that a religious exception application be accompanied by a "current" letter from the officer's religious leader. The absence of such a requirement can offer no defense for Whack's transgressions. Simply put, regardless of the construction to be given to Directive 78 in this regard, the fact remains that Whack falsified the Imam's letter included with each of the applications at issue by altering the date reflected thereon, and, as such, violated Disciplinary Code Section 1-§010-10.

By extension, any defense based on Whack's professed belief that Directive 78 did not require him to include a new letter from his Imam each year with his religious exception application fails for the same reasons. It does and cannot negate his knowing

and willful act of including with each application at issue a copy of the Imam's letter bearing an altered date. Further, his alteration of the date on the Imam's letter belies his stated belief regarding the requirements of Directive 78. Indeed, if he understood that the Directive did not require him to support his application each year with a contemporaneous letter from his Imam, then there would have been no reason for him to have altered the date on the letter that he submitted with each of the five applications in question.

In sum, by all accounts, it appears that Whack was entitled to receive a religious exception to Directive 78's beard prohibition in each of the years at issue. However, he chose to shortcut the process in those years by supporting his application with an altered version of an earlier year's letter from his Imam. In doing so, he is guilty of violating Disciplinary Code Section 1-§010-10.


The only question remaining is whether a five-day suspension was the appropriate penalty for this transgression. The answer is plainly yes. Under the Department's Disciplinary Code, which has been negotiated and incorporated into the parties' collective bargaining agreement, a five-day suspension is the most lenient penalty applicable to a first violation of Section 1-§010-10. Therefore, I am without any basis to conclude that the penalty imposed was excessive.

Accordingly, for all these reasons, the Union's grievance is denied.

AWARD

1. The grievance is denied.
2. The City had just cause to suspend Dominick Whack for five days, effective January 11, 2016.

May 1, 2017




David J. Reilly, Esq.
Arbitrator

STATE OF NEW YORK)
)
COUNTY OF NEW YORK) ss.:

I, DAVID J. REILLY, ESQ., do hereby affirm upon my oath as Arbitrator that I am the individual described herein and who executed this instrument, which is my Award.

May 1, 2017



David J. Reilly, Esq.
Arbitrator